No. 83-5596

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JOSEPH ROBERT SPAZIANO,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

REPLY AND SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The brief in opposition filed by Respondent merits a few words in reply.

I. THE "BECK ISSUE"

Respondent's argument is premised on the Motion that "the mere imposition of sentence has no bearing on the so-called Beck v. Alabama issue." The State appears to contend that when the validity of Petitioner's conviction was before this Court in 1980, this really was a capital case, even though "technically" Petitioner's death sentence had, at that time, been vacated by the Florida Supreme Court.

The short answer is that this was not a death case in 1980 simply because at that time Petitioner was not under sentence of death. Where Petitioner was at that time before this Court only for review of his conviction, since the Florida Supreme Court had vacated his death sentence, he is now seeking review of the reimposed death sentence. It is precisely this new posture which brings the issue presented squarely within the Eighth Amendment standards of reliability enunciated by this Court in Beck.

The difference between the posture of the case then and its posture now is crucial. The proof of this proceeds in two stages: first, failure to instruct on lesser offenses raises

special dangers of factfinding inaccuracy and unreliability and second, this enhanced unreliability, though undersirable in noncapital cases, rises in capital cases to the level of being an infirmity of constitutional magnitude.

This Court has recognized that deprivation of a lesser-offense instruction is detrimental to the defendant's interest in reliable jury factfinding. The Court reasoned in Keeble v. United States, 412 U.S. 205, 212-213 (1973) that "where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." This is simple common sense. It takes no more than the most cursory knowledge of human behavior to apprehend the constitutionally precarious dilemma into which Petitioner's jury was placed. A jury that possesses a reasonable doubt as to one of the elements of the offense charged, but no doubt as to the defendant's guilt of a lesser offense that does not require proof of the questioned element, is likely, if precluded from convicting of the lesser offense, to resolve its doubts in favor of conviction of the greater. In the context of a murder trial a Florida jury is likely to compromise its adherence to the reasonable doubt standard rather than subjugate its moral outrage.

It is, of course, true that the risk of erroneous results can never be totally eliminated from our necessarily imperfect legal system. But only in capital cases is it clear that the need for reliability rises to the level of constitutional imperative. Death is different, and the infliction of death by official choice must require a higher degree of reliability than we can practicably require of all other aspects of law. This in fact was the basis of Beck v. Alabama, where this Court made clear that when the evidence established that the defendant is guilty of "a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the 'third option' of conviction of a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated when the defendant's life is at stake.

As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments." 447 U.S. 625, 638 (1980) (emphasis added). "To ensure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination ... Thus, if the unavailabiity of a lesser included offense instruction enhances the risk of an unwarranted conviction, [Florida] is constitutionally prohibited from withdrawing that option from the jury in a capital case." Id.

Thus, it matters very much that now this is a death case. It matters because the dangers sought to be averted by Beck's holding quite aparently came true in the present case. The jury, which had considerable difficulty in reaching a verdict on guilt after a number of hours of deliberation -- interrupted with judicial inquiry, reported deadlock and an "Allen" charge had little difficulty in issuing an almost immediate sentencing verdict of life imprisonment. The evidence supporting guilt was at best inconclusive -- there was virtually no evidence as to the degree of the homicide and only weak circumstantial evidence that Petitioner was actually involved in the offense -- yet the jury was faced with a murder that was portrayed as brutal and provided with only two options: guility of first degree murder or not guilty. The jury did not have the "third option" mandated by Beck. Under these circumstances the jury exercised the only reasonable option it had available: it found Petitioner guilty of first degree murder but issued a sentencing verdict of life imprisonment. This life verdict, however, was overridden by the trial judge who imposed the death sentence on Petitioner. The Florida Supreme Court affirmed the death sentence.

Accordingly, the danger of unreliability came true in this case. The trial judge's instruction presented an imposible Hobson's choice to the jury, a jury confronted with flimsy evidence of first degree murder. The refusal to instruct on lesser offenses prevented the jury from finding Petitioner guilty of a lesser offense, which it had the exclusive right to do and for which there was a reasonbale construction of the evidence.

For example, the jury might well have believed that Petitioner was somehow involved and knew about the homicide yet found the evidence insufficient to support the essential element of premeditation. Since there were no lessers, the jury should have acquitted, yet, as this Court has recognized, where a defenant is guilty of some offense the jury is more likely to resolve its doubts in favor of conviction. Petitioner's jury had only one safeguard against the possibility of innocence of first degree murder: to find Petitioner guilty but to recommend life. That is exactly what his jury did.

II. THE JURY OVERRIDE AS APPLIED TO THIS CASE

Petitioner will rely upon the discussion in his initial petition.

III. THE FACIAL CONSTITUTIONALITY OF THE JURY OVERRIDE

Petitioner will rely upon his initial petition, except to challenge Respondent's contention that this issue has been somehow waived. The single, out of context sentence in Petitioner's Florida Supreme Court brief, upon which Respondent bases its contention, is no more than an acknowledgment, also made in our certiorari petition, that "this Court has suggested that the override is constitutional." Petition for Certiorari Petitioner at 21. Petitioner is aware that lower courts have read this Court's decisions in Proffitt, Dobbert, and Barclay as foreclosing the issue. Id. Most recently, in Douglas v. Wainwright, 714 F.2d 1532, 1552-53 (11th Cir. 1983), the eleventh circuit held that "whatever the merit of appellant's claim ... under the decisions in Barclay, Dobbert , and Proffitt, the system of overriding jury reconsiderations of life imprisonment is not unconstitutional." It is for this reason that only this Court can revisit the issue. Petitioner respectfully asks this Court to do just that.

Moreover, it is clear from Petitioner's motion for rehearing before the Florida Supreme Court that the facial validity of the jury override was in issue. Petitioner there argued:

> In permitting the death sentence to be imposed over the jury's life verdict on the basis of information not presented to the jury, this Court has derogated the constitutional role of the jury in Florida's capital sentencing system. Findings regarding the presence or absence of aggravating or mitigating circumstances are findings of fact as to which a defendant has a Sixth Amendment right to trial by jury. By allowing a death sentence to be imposed upon facts not presented to the jury, the Sixth Amendment guarantee is abrogated. The principle that death sentences may be imposed only through the intervention of a jury is fundamental to our jurisprudence and provides an essential assurance against disproportionality, excessiveness and arbitrariness in capital sentencing. Cf. Lockett v. Ohio, 438 U.S. 586, 609 (1978) (reserving the question regarding the constitutional need for jury sentencing).

The issue of the facial validity of the override was squarely presented to the court below.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, CRAIG S. BARNARD, hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Reply and Supplemental Brief in Support of Petition for Writ of Certiorari on counsel for respondent by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Honorable Richard W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Daytona Beach, Florida 32014

All parties required to be served have been served. Done this ____ day of November, 1983.

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QUESTIONS PRESENTED

1. Whether a death sentence imposed after a jury verdict of guilty of a capital offense violates the Eighth Amendment and the Due Process Clause where the jury was precluded under the state statute of limitations from considering a verdict of guilt of noncapital lesser included offenses though the evidence would have supported a verdict on such an offense?

2. Whether a trial judge's override of a jury's factually based decision against the death penalty contravenes, in all cases, the Fifth, Sixth, Eighth and Fourteenth Amendments?

3. If the override of a jury's life verdict is constitutional on its face, are the Florida standards for the override applied in a manner that discounts the jury's consideration of mitigating factors and that is so broad and vague as to violate the constitutional requirement of reliability in the determination that death is the appropriate punishment in a particular case?

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